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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-773

UNITED STATES LINES, INC.,
Petitioner,

v.

SUN SHIPBUILDING & DRY DOCK COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. The Propriety of the District Court's Award of Prejudgment Interest, Affirmed by the Third Circuit, Is Not an Important Issue Requiring Consideration by This Court 7

A. The District Court Properly Decided the Question of Prejudgment Interest Under Pennsylvania Law 7

B. The Decision Below Does Not Conflict With the Decision of the Court of Claims 9

C. The District Court's Decision Does Not Conflict With This Court's Decision in *Crown Coat Front v. United States*, Nor Does It Conflict With the District Court's Own Prior Decision Regarding the Statute of Limitations 11

II. The District Court's Decision to Award Sun Compensation for Delay Associated Costs Is Not in Conflict With This Court's Decisions in *United States v. Rice and United States v. Blair* 12

CONCLUSION 15

TABLE OF CITATIONS.

Cases:	Page
California v. United States, — U. S. —, 98 S. Ct. 2985 (1978)	14
Clarke Baridon, Inc. v. Merritt-Chapman and Scott Corp., 311 F. 2d 389 (4th Cir. 1962)	8
Cold Metal Process Co. v. United Engineering & Foundry Co., 235 F. 2d 224 (3d Cir. 1956)	7
Crown Coat Front Co., Inc. v. United States, 386 U. S. 503 (1967)	2, 11, 12
E. I. Du Pont de Nemours and Company, et al. v. Lyles and Lang Construction Company, 219 F. 2d 328 (4th Cir.), cert. denied 349 U. S. 956 (1955)	8
Estate of Spiegel v. Commissioner, 335 U. S. 701 (1949)	7
Hawaiian International Shipping Corp., MSB No. CA-98, 18 SRR 673 (1978)	4
Helvering v. Stuart, 317 U. S. 154 (1942)	7
Houston Oil Co. of Texas v. Goodrich, 245 U. S. 440 (1918)	9
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387 (1923)	9, 10
Marrazzo v. Scranton Nehi Bottling Co., Inc., 438 Pa. 72, 263 A. 2d 336 (1970)	7
Miller v. Robertson, 266 U. S. 243 (1924)	7
Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc., 461 Pa. 420, 336 A. 2d 609 (1975)	8
Prudential Insurance Co. v. City of Philadelphia, No. 73-110 (E. D. Pa. Oct. 24, 1975), aff'd No. 76-1559 (3d Cir. Jan. 7, 1977)	7
Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 (1955)	9
Rolls-Royce, Ltd. v. United States, 364 F. 2d 415 (Ct. Cl. 1966)	10
Steele v. General Mills, Inc., 329 U. S. 433 (1947)	7
Swartzbaugh Manufacturing Company v. United States, 289 F. 2d 81 (6th Cir. 1961)	8
Udall v. Tallman, 380 U. S. 1 (1965)	14

TABLE OF CITATIONS (Continued).

Cases (Continued):	Page
United States v. American Trucking Associations, Inc., 310 U. S. 534 (1940)	14
United States v. Blair, 321 U. S. 730 (1944)	2, 12, 13, 14
United States v. King, 395 U. S. 1 (1969)	10
United States v. Rice, 317 U. S. 61 (1942)	2, 12, 13
United States v. Thayer-West Point Hotel Co., 329 U. S. 585 (1947)	10
Statutes and Court Rules:	
Federal Register, 36 FR 5805	3
28 U. S. C. § 2516(a)	10
U. S. Sup. Ct. Rule 19, 28 U. S. C.	6, 11
Merchant Marine Act of 1936, as amended, 46 U. S. C. § 1101, et seq.	3, 14

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SUN SHIPBUILDING & DRY DOCK COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

The respondent, Sun Shipbuilding and Dry Dock Company (hereinafter "Sun"), submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed by petitioner United States Lines, Inc. (hereinafter "USL"), and respectfully prays that the petition for writ of certiorari be denied.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED.

Two primary questions are presented by this case, neither of which is worthy of review by this Court. They are as follows:

I. Whether, in the factual circumstances of this diversity case, the district court properly awarded prejudgment interest to Sun under the law of Pennsylvania?

II. Whether the district court's finding that Sun was entitled to recover delay associated costs under the now superseded contract provisions involved in this action between two private parties is contrary to this Court's interpretation of different language in contracts between the government and private parties in *United States v. Rice*, 317 U. S. 61 (1942), and *United States v. Blair*, 321 U. S. 730 (1944)?

USL has split the first issue into four. Although none of these subissues is appropriate for this Court's consideration and all are subsumed into the primary issue stated by Sun, USL's first and third issues should be restated as follows to achieve clarity and accuracy:

Whether the district court's award of prejudgment interest to Sun on amounts due from USL for work performed during the construction of five ships was contrary to a prior Court of Claims decision in the case of *Sun Shipbuilding and Dry Dock Company v. United States of America*, Court of Claims No. 61-73, and whether the district court properly considered that decision?

Whether the district court's decision to award prejudgment interest, in accordance with Pennsylvania law, from a time one year after Sun's submission of its final estimate of change costs conflicts with this Court's decision in *Crown Coat Front Co., Inc. v. United States*, 386 U. S. 503 (1967), holding that a government contractor's cause of action accrues upon completion of a mandatory disputes process because, among other reasons, the contractor could not have initiated suit before exhausting administrative remedies?

COUNTERSTATEMENT OF THE CASE.

Respondent Sun is a shipbuilding company. On November 24, 1965, it delivered to USL the last of five cargo vessels it had constructed for USL. As of that date, Sun had already paid out all monies necessary to complete the vessel. At the filing of this brief—more than thirteen years later—Sun still has not received from USL the full amount due for the ships. USL, on the other hand, has had both the use of the ships and the use of the money for this time period. On June 28, 1977, almost twelve years after delivery, USL did consent to an order of partial summary judgment for $460,106.03—a portion of Sun's claim that, although not disputed, had not been paid by USL at that late date. As of today, another $466,511.14 in principal still remains outstanding. Interest has not been paid on any of the money owed, although a judgment for the principal and $601,363.00 in interest was entered on November 30, 1977 (175a).

The history of this inequitable saga began on October 10, 1962, when Sun, as low bidder under the procedures of the Ship Construction Subsidy Program then in effect, entered into a tripartite Maritime Administration Construction Differential Subsidy Contract with USL and the United States Maritime Administration ("MarAd") for the construction of five cargo vessels.[1] Under the terms

1. The Ship Construction Subsidy Program derives its statutory authority from the Merchant Marine Act of 1936, 46 U. S. C. §§ 1101, 1151-1161. Since the events of this case the Act has been amended by The Merchant Marine Act of 1970 (PL 91-469). The standard form construction-differential subsidy contract used prior to 1970 (and used in this case) was outmoded by that amendment. Therefore on March 27, 1971, the Maritime Subsidy Board published in the Federal Register, 36 FR 5805, a notice of proposed rulemaking stating that the Board was contempating adopting new contract forms changing numerous provisions including the crucial "Changes" and "Disputes" provisions. The former tripartite contract was also to be separated into three separate two-party con-

of the contract, USL was to pay 51.4% of the price of the vessels and MarAd was to subsidize the cost to USL of the construction of the vessels to the extent of 48.6%.

According to the contract, the five ships were to be delivered at intervals between September 29, 1964, and July 26, 1965. Sun's low bid, however, was predicated on its ability to deliver the ships substantially early. Thus Sun scheduled the first ship for delivery in July, 1964 with the remaining ships to follow at 75-day intervals.

On May 31, 1963, however, Sun was ordered to perform a technically difficult and time-consuming change in the construction of the vessels: automation of the engine rooms. On October 1, 1963, Sun was further ordered over its strong protestations to effect a rearrangement of the crew quarters. These changes were directed in accordance with Article 4 of the contract which permitted USL and MarAd unilaterally to order changes in the construction of the vessels. When such a change order was directed, the contract required the Contractor (here Sun) to proceed promptly with the work, even if there was a dispute regarding the estimated cost of the change. (Article 4(b) and (e), 14a-16a).

Despite these significant and complex changes, Sun performed the contract expeditiously and delivered the ships at intervals from November 12, 1964 to September 24, 1965—an average of only 46 days later than the contract delivery dates. On November 24, 1965, two months after delivery of the final vessel, Sun submitted a claim for more than $5,000,000 for the increased costs resulting from the change orders and the delays caused by them.[2]

1. (Cont'd.)
tracts. New contract forms are now being used. The type of contract used today is described briefly in *Hawaiian International Shipping Corp.*, MSB No. CA-98, 18 SRR 673 (1978).

2. The contract provided in Article 4(e) that the shipbuilder would be compensated for changes as follows:

In an attempt to collect this contractually provided compensation, Sun began wending its way through a labyrinth of hearings and decisions. USL's Petition sets forth most of the crucial stages in this extended administrative disputes process.[3]

Finally in January of 1972—more than six years after delivery of the last ship, the Secretary of Commerce determined that the increased cost resulting from the changes was $3,070,547.95.

The final administrative decision having been rendered, Sun, on February 8, 1972, in accordance with the contract,[4] submitted applications for a progress payment. MarAd paid its 48.6% of the progress payment, but USL still refused to pay. Sun therefore notified MarAd of USL's refusal to pay in accordance with Article 31 of the contract which provides that in certain circumstances the Government must assume the obligations of a defaulting owner. When the Government refused to pay USL's share, Sun filed a petition in the Court of Claims proceedings described at pages 5 and 6 of USL's Petition.

Since the Court of Claims had no jurisdiction of any claims by Sun against USL, however, Sun brought the present diversity suit on August 7, 1975 to recover $926,617.17—the amount still due at that time from USL, plus prejudgment interest. During the course of the proceedings in the district court, the partial summary judgment order referred to above was entered. The rest of

2. (Cont'd.)
One hundred and ten percent (110%) of the net increase in estimated cost, if any, resulting from all change cost estimates, as approved or finally determined, shall be added to the contract price as an adjustment thereof.
(16a).

3. Article 36 of the General Provisions of the Contract, found at 21a-22a of the Appendix, sets forth part of the procedure for resolving disputes.

4. Articles IV and 31 at 4a-9a and 20a-21a.

the judicial proceedings are described by USL at page 7 of its Petition. The remainder of the amount found to be due to Sun in the administrative process, by the district court and by the court of appeals is still unpaid.[5]

REASONS FOR DENYING THE WRIT.

This is a diversity case involving the application of Pennsylvania law to an ordinary contract dispute between two private parties. The district court's decision, affirmed by the Third Circuit, relies on the particular facts and equities of this case, interprets the specific contract language at issue, and applies traditional legal principles (143a). The contract involved in this dispute is no longer used by the Maritime Administration and the shipbuilding industry. (See Footnote 1, *supra*). No "special and important reasons" exist for this Court to exercise its discretionary power to review the issues of this limited case. U. S. Sup. Ct. 19, 28 U. S. C.

Nevertheless USL has filed a petition for a writ of certiorari and has listed five "Questions Presented." The five questions actually fall into the two primary categories stated by Sun above: (1) the propriety under Pennsylvania law of the district court's award of prejudgment interest, and (2) Sun's right to compensation for costs resulting from delay caused by USL and the Government's change orders.

5. USL's 51.4% share of the Secretary's award ($3,070,547.95) was $1,578,261.65. USL had paid $651,644.48 prior to the instant action leaving a remainder of $926,617.17 due. The district court granted Sun $460,106.03 in principal on its partial summary judgment order, and $466,511.14 in principal in its full summary judgment for a total of $926,617.17. The District Court granted Sun in its full summary judgment order prejudgment interest on the $926,617.17 from November 24, 1966 at the legal rate of 6% in the amount of $601,363.00.

I. The Propriety of the District Court's Award of Prejudgment Interest, Affirmed by the Third Circuit, Is Not an Important Issue Requiring Consideration by This Court.

A. The District Court Properly Decided the Question of Prejudgment Interest Under Pennsylvania Law.

In this diversity action, the district court decided that under Pennsylvania law[6] "the court, in its discretion, may in a particular case find that the equities of the circumstances demand an award of interest and may grant such an award as it deems proper" (147a). The court necessarily found that Pennsylvania law did not require either a breach of contract or the right to demand payment of the principal amount as a prerequisite to prejudgment interest. USL now petitions this Court to review this decision even though the district court carefully considered each of the issues raised by USL and the Third Circuit affirmed the lower court's decision.

This Court has enunciated a firm policy to leave undisturbed a reasonable interpretation of purely local state law by a court of appeals (or district judge) which sits within a state and is constantly required to pass upon state law questions. *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 707-8 (1949); *Steele v. General Mills, Inc.*, 329 U. S. 433, 439 (1947); *Helvering v. Stuart*, 317 U. S. 154, 162-5 (1942). The Court should not depart from that policy in this case.

6. The court cited, *inter alia*, the following cases: *Miller v. Robertson*, 266 U. S. 243, 258 (1924); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 235 F. 2d 224, 231 (3d Cir. 1956); *Prudential Insurance Co. v. City of Philadelphia*, No. 73-110 (E. D. Pa. Oct. 24, 1975), *aff'd* No. 76-1559 (3d Cir. Jan. 7, 1977); *Marrazzo v. Scranton Nehi Bottling Co., Inc.*, 438 Pa. 72, 74-5, 263 A. 2d 336 (1970) (147a).

As the district court noted, the rules on discretionary prejudgment interest are similar under Pennsylvania and federal law (146a). Both permit such an award where the equities of the particular case demand it. For example, in an analogous case, the Pennsylvania Supreme Court has approved an award of interest from a time prior to the rendering of an arbitration award under the disputes clause of a construction contract with a state agency. *Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc.*, 461 Pa. 420, 336 A. 2d 609 (1975). Numerous federal cases interpreting government contracts have also awarded prejudgment interest, not on the basis of breach of contract, but primarily on equitable bases or on the ground that the right to interest was an implied part of the contract.[7]

After finding the applicable law, the court then turned to the facts of the case and held:

> In view of *these facts*, I conclude that the *equities in this case* weigh heavily in plaintiff's favor, and I have therefore exercised my discretion to award prejudgment interest to Sun.

(Emphasis added) 149a.[8]

The district court also decided to award interest from November 24, 1966—one year after submission of Sun's final cost estimate—by looking to the overall scheme of the entire contract (151a).

USL complains at length in its petition that the court's interpretation of the contract was erroneous (Petition, pp. 12-15). The court's analysis was not erroneous, as a reading of the contract and the opinion will show. More important, however, the construction of a contract no longer used, in conjunction with an analysis of the particular facts affecting the operation of that contract, is not an appropriate issue for exercise of this court's discretionary review.[9] The government is not a party, and the decision would affect few, if any, persons other than USL and Sun. This Court has clearly stated that:

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393 (1923). *Accord: Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70, 74 (1955).

In an effort to obscure the clear unworthiness of its request for this Court's review, USL formulates two more issues concerning prejudgment interest each of which alleges a conflict with another decision. Neither are meritorious, but are briefly discussed below.

B. The Decision Below Does Not Conflict With the Decision of the Court of Claims.

USL asserts that the decision of the district court that Sun's payment demand became "payable" on November

7. *E. I. DuPont de Nemours and Company, et al. v. Lyles and Lang Construction Company*, 219 F. 2d 328 (4th Cir.), *cert. denied* 349 U. S. 956 (1955); *Clarke Baridon, Inc. v. Merritt-Chapman and Scott Corp.*, 311 F. 2d 389 (4th Cir. 1962); *Swartzbaugh Manufacturing Company v. United States*, 289 F. 2d 81 (6th Cir. 1961).

8. See also last paragraph of 147a and last paragraph of section A on 150a.

9. *Cf. Houston Oil Co. of Texas v. Goodrich*, 245 U. S. 440 (1918), where a writ of certiorari was dismissed as improvidently granted because the alleged legal errors of the lower court "depended essentially upon an appreciation of the evidence." Also of significance was the agreement on the issues between the district court and the court of appeals. *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955) where one reason for dismissing a writ of certiorari as improvidently granted was that the question would not arise again as a result of a new statute enacted after commencement of the law suit at issue.

24, 1966 for purposes of calculating interest conflicts with the Court of Claims' interpretation of the contract. This assertion is insupportable.

The issue before the Court of Claims was whether the government had breached Article 31 of the contract (20a-21a) by failing to pay USL's share of the Secretary of Commerce's award after USL had refused to pay (119a-121a). The Court of Claims decided that the Secretary's award was not 'final" for purposes of activating the obligations under Article 31. It did not decide whether the award was "final" for any other purposes or when the debt was "payable." The issues before the district court and the Third Court were whether Sun was entitled to prejudgment interest and, if so, from what date.

The Court of Claims simply was not presented with the interest issues that confronted the district court.[10] Nor could it have been. First, the suit in the Court of Claims was brought only against the government, not against USL. The Court of Claims does not have jurisdiction over actions for money damages between private parties, *Rolls-Royce Ltd. v. United States*, 364 F. 2d 415 (Ct. Cl. 1966); nor does it have the power to grant declaratory judgments. *United States v. King*, 395 U. S. 1 (1969). Second, Sun's petition in the Court of Claims did not request interest since interest is not recoverable against the United States under 28 U. S. C. § 2516(a), unless a contract or act of Congress specifically provides for its payment. *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, 590 (1947). Thus no conflict exists between the Court of Claims decision and the district court's decision.[11]

10. The district court describes the dichotomy of the issues at 152a-153a, n. 10.

11. This Court has dismissed writs of certiorari as improvidently granted where there was no conflict between courts as had been alleged in the petition. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387 (1923).

USL further asserts that the district court erroneously failed to reach the merits of USL's collateral estoppel defense. This Court, however, is not a court that sits merely to provide an appellate forum for the correction of lower court errors. Review by this Court is a matter of discretion[12] and should be exercised only when an important and recurring issue arises. This is not such an issue.

In any event, the district court did consider the collateral estoppel issue. Like the interest issue, the collateral estoppel question is controlled by Pennsylvania law, which the court discussed at length in its opinion, and correctly applied (154a-155a).[13]

C. The District Court's Decision Does Not Conflict With This Court's Decision in *Crown Coat Front v. United States*, Nor Does It Conflict With the District Court's Own Prior Decision Regarding the Statute of Limitations.

USL contends for the first time[14] in its petition for certiorari that the district court's decision to begin interest from a date one year after submission of the final estimate conflicts with this Court's holding in *Crown Coat Front Co., Inc. v. United States*, 386 U. S. 503 (1967). This also is insupportable. The issue in *Crown Coat Front* was whether a contractor's right to bring a civil action on a claim within the standard disputes clause of a different government contract accrued at the time of the final administrative action or at an earlier date. The Court de-

12. U. S. Sup. Ct. Rule 19, 28 U. S. C.

13. The district court statement that USL quotes at p. 10 of its petition—"Without reaching the merits of the res judicata argument . . ."—is taken from a footnote in the section preceding the court's discussion of the collateral estoppel defense (152a-153a, n. 10).

14. This issue was not specifically raised in USL's brief to the United States Court of Appeals for the Third Circuit, nor was it discussed in USL's Memorandum in Support of its Motion for Summary Judgment.

cided on the former date, finding, *inter alia,* that in order to protect a contractor who might be subjected to a lengthy administrative process from being time-barred from the courts, the 6-year statute of limitations should not commence until the termination of the administrative proceedings. The Court was not presented with any question under state law regarding the obligation of payment or the commencement of interest, and its statute of limitations decision does not conflict with the district court's interest decision.

USL further claims that the district court's decision is in conflict with the district court's previous decision, similar to *Crown Coat Front,* finding that the applicable four-year statute of limitations did not begin to run until the completion of the disputes process.[15] The two decisions are not incompatible. In the first decision (130a), the court decided when Sun could sue USL in court. In the second decision it decided from what date Pennsylvania law permitted Sun to collect interest. Furthermore, the court made clear at the outset of its second opinion that its decision was based, not upon a default by USL and not upon a finding that Sun had the right to demand payment, but rather upon the equities of the case. No conflict exists between these opinions and no reason exists for the Court to exercise its discretion to review this meritless and unimportant issue.

II. The District Court's Decision to Award Sun Compensation for Delay Associated Costs Is Not in Conflict With This Court's Decisions in *United States v. Rice* and *United States v. Blair.*

The district court held, and the Third Circuit concurred, that Sun was entitled to recover $466,511.14 from

15. The district court, however, was presented with this alleged conflict in USL's Motion for Reconsideration and found that allegation to be without merit (173a-174a). The Third Circuit agreed.

USL for delay associated costs resulting from the changes ordered under the contract (155a-160a, 175a). In doing so, the courts affirmed the decisions of the Secretary of Commerce (114a-118a) and the Maritime Subsidy Board (23a, 48a-64a) on that issue. USL contends, however, that an award of any delay-associated costs is in conflict with this Court's decision in *United States v. Rice,* 317 U. S. 61 (1942). It further argues that even if compensation for some delay associated costs is appropriate, an award of such compensation for delay suffered prior to the contract delivery dates of the vessels is in conflict with this Court's decision in *United States v. Blair,* 321 U. S. 730 (1944). Neither of these assertions has any merit.

The contract provisions relied on in *Rice* are substantially different from those at issue in this case.[16] Where the *Rice* contract provisions made a dichotomy between a change in the amount due under the contract and a change in the time limit for completion, providing more money for the first and more time for the second, the contract provision in the case now before this Court deals only with monetary compensation for the increases (or decreases) in the cost of performing all of the contract work (Article 4, 14a-16a). All extensions of time are dealt with in a completely separate article (Article 5, 164a-166a).

In *Rice,* this Court directed that any inquiry concerning the recoverability of certain costs must focus on the precise language of the contract. 317 U. S. at 66-68. Since the precise language of the contract at issue is different from the precise language of *Rice,* the district court's decision is not in conflict with this Court's opinion in *United States v. Rice.*[17]

16. The *Rice* contract provisions are found at 317 U. S. 66, n. 1.

17. In the proceedings before the Board, the government, as third party to the contract, did not question the inapplicability of *Rice,* even though that position was contrary to its financial interest (48a).

Petitioner's only argument relating to *Blair* is that it "requires" that the language of the contract "must explicitly state the obligation" to pay pre-delivery date costs (Petition at 28). *Blair* says no such thing. All that *Blair* holds is that a suit against the United States by one contractor for breach of contract for unreasonably delaying the termination of another contractor, which delay prevented early completion of the first contract, will not succeed in the absence of a clause in the first contract putting the responsibility for prompt termination of other contractors on the government. No question exists in this case as to the responsibility of USL and the United States under the contract. They were clearly obligated to pay for the net increase in the cost of the contract work resulting from the changes they directed. Because of the dissimilarity of the contracts, the district court's opinion is not in conflict with *United States v. Blair.*

The Maritime Subsidy Board, the agency charged with administering MarAd contracts, also rejected USL's *Rice* and *Blair* arguments. In reaching its decision the district court properly put great weight on the Board's decision "in view of the Maritime Administration's experience with the standard contract at issue here. . . ." (157a). This Court has often held that great deference is to be given the views of the agency charged with the day-to-day operation of a statutory[18] or administrative program. *Udall v. Tallman,* 380 U. S. 1, 16-18 (1965). *See, California v. United States,* — U. S. —, 98 S. Ct. 2985, 3001, n. 30 (1978); *United States v. American Trucking Associations, Inc.,* 310 U. S. 534, 539 (1940).

Since the district court was correct in holding *Rice* and *Blair* inapplicable, its decision does not conflict with those cases.

18. Here the contracts, no longer in use, were drafted pursuant to the Merchant Marine Act of 1936, as amended, 46 U. S. C. §§ 1151-1161.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

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